IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 31315

STATE OF IDAHO,	)	
	)	**2005 Opinion No. 70**
Plaintiff-Appellant,	)	
	)	**Filed: December 1, 2005**
v.	)	
	)	**Stephen W. Kenyon, Clerk**
CHRISTIAN REED SMITH,	)	
	)	
Defendant-Respondent.	)	
	)	

Appeal from the District Court of the Second Judicial District, State of Idaho, Latah County. Hon. John R. Stegner, District Judge.

Order granting motion to suppress evidence, vacated and case remanded.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for appellant. Kenneth K. Jorgensen argued.

Carole Wells Law Office, Moscow, for respondent.

SCHWARTZMAN, Judge Pro Tem

The state of Idaho appeals the district court's order suppressing evidence. The district court found that the state failed to establish exigent circumstances justifying a second entry and search of Christian Smith's apartment after a fire. The district court also found that the state failed to show that Smith voluntarily consented to a later search of his apartment. We vacate and remand.

I.
FACTUAL & PROCEDURAL BACKGROUND

In the early morning hours, Christian Smith's couch caught fire inside his apartment located in an old, Victorian-style house. Smith and a friend dragged the couch downstairs and out to the driveway where they attempted to extinguish it with a garden hose. Their efforts in removing the couch produced a hole in the wall outside of Smith's apartment, prompting Smith to leave a note to his landlord on the wall explaining that he was sorry and would clean and

repair the mess after work. Leaving the smoldering couch in the driveway, Smith went to bed for a few hours until he awoke and proceeded to work.

In the early afternoon of that same day, the Moscow Fire Department responded to a call from a concerned neighbor about the couch fire. A fire engine was dispatched to Smith's apartment building "running code," meaning the engine responded as though there was an emergency and with its lights and sirens on. Soon thereafter, Fire Battalion Chief Aaron Watson ("Chief Watson"), who was responding in a different vehicle, called the engine operator and told him to "reduce code," meaning he should not travel with lights and sirens, because Watson had been informed that the fire was extinguished.

A volunteer firefighter, Jason Blubaum, also responded in a separate vehicle and was the first to arrive at the scene. Upon arrival, Blubaum noticed the couch in the driveway and three people--apparently Smith's neighbors--spraying it with a garden hose. Blubaum testified that he saw a "little bit of smoke coming out of one corner of the couch." At the time, Blubaum did not see any visible smoke or fire coming from the apartment building, but he did notice a trail of black soot leading from Smith's apartment to the couch in the driveway. Upon the landlord's request, Blubaum went to Smith's apartment to determine whether there was any remaining fire danger and to investigate the cause of the fire. Once inside the apartment, Blubaum determined that no fire danger remained and that placement of the couch against a baseboard heater may have caused the fire. After three to five minutes, Blubaum looked out a window, saw Chief Watson arrive, and immediately exited to meet him and relate his findings.

After a brief conversation with Blubaum, Chief Watson dismissed him from the scene and told the engine to return to the station, concluding that he could properly handle the situation himself. Then, based on the landlord's renewed request to have the apartment investigated, Chief Watson, accompanied by Moscow police officer Keith Cox, re-entered Smith's apartment.[1] During his search, Chief Watson found evidence disproving firefighter Blubaum's initial assessment of the fire's cause, but was unable to determine exactly what caused the fire without

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[1] Chief Watson also testified that he went into the apartment despite firefighter Blubaum's assessment because he "always go[es] in and check[s] especially when [he's] the officer on duty." As for officer Cox's accompaniment, Chief Watson testified that he prefers to have someone witness his investigation "just to make sure everything's on the up and up."

talking to the tenant. Before leaving to find Smith, however, the officials saw a small white ivory pipe, some marijuana seeds and a packet of rolling papers sitting on the coffee table.

Chief Watson and Cox then drove to Smith's workplace, where he agreed to accompany them back to his apartment in the police car. Once back at the apartment building, Cox informed Smith that they had already been in his apartment and had seen the marijuana pipe and seeds. Officer Cox then explained that he intended to re-enter Smith's apartment to conduct a search and asked Smith to sign a consent form while also explaining that Smith had a right to refuse. Smith initially balked at signing the form, which prompted attempts by Cox and another officer to persuade Smith to sign. Smith eventually signed the consent form, after which Cox, now accompanied by Chief Watson, re-entered and searched Smith's apartment, seizing several items of drug paraphernalia and one growing marijuana plant.

Based on the evidence obtained during these entries, Smith was charged with manufacture of a controlled substance in violation of Idaho Code § 37-2732(a)(1)(B). Prior to trial, Smith moved to suppress this evidence on the grounds that the investigative entry by Chief Watson and officer Cox violated his Fourth Amendment rights. The district court granted Smith's motion to suppress, finding that no exigency existed to justify the officials' second warrantless entry after firefighter Blubaum's initial assessment, and that Smith's subsequent consent to search was involuntary. The state appeals, claiming the district court misapplied the law in suppressing this evidence.

II.
ANALYSIS

A. Exigent Circumstances

The Fourth Amendment to the United States Constitution and article I, § 17 of the Idaho Constitution protect individuals against unreasonable searches and seizures. Although a warrantless search is presumptively unreasonable, it may still be permissible if it falls within a recognized exception to the warrant requirement or is otherwise reasonable under the circumstances. *Minnesota v. Dickerson*, 508 U.S. 366 (1993); *State v. Weaver*, 127 Idaho 288, 290, 900 P.2d 196, 198 (1995); *State v. Greene*, 140 Idaho 605, 607, 97 P.3d 472, 474 (Ct. App. 2004); *State v. McIntee*, 124 Idaho 803, 804, 864 P.2d 641, 642 (Ct. App. 1993). Under the exigent circumstances exception, agents of the state may conduct a warrantless search when the facts known at the time of the entry, along with reasonable inferences drawn thereupon,

demonstrate a "compelling need for official action and no time to secure a warrant." *Michigan v. Tyler*, 436 U.S. 499, 509 (1978); *State v. Barrett*, 138 Idaho 290, 293, 62 P.3d 214, 217 (Ct. App. 2003). The burden is on the government to show the applicability of this exception to the warrant requirement. *State v. Brauch*, 133 Idaho 215, 218-19, 984 P.2d 703, 706-07 (1999); *State v. Salinas*, 134 Idaho 362, 365, 2 P.3d 747, 750 (Ct. App. 2000). In reviewing the district court's determination of whether exigent circumstances justified a warrantless search, this Court gives deference to the district court's factual findings unless they are clearly erroneous, but exercises free review of the trial court's determination as to whether constitutional requirements have been satisfied in light of the facts found. *State v. Rusho*, 110 Idaho 556, 559, 716 P.2d 1328, 1331 (Ct. App. 1986).

In the present case, the district court found that the state had not sufficiently demonstrated the existence of exigent circumstances justifying Chief Watson and officer Cox's re-entry into Smith's apartment to investigate the fire. Specifically, the district court held that whatever exigency arose from the couch fire incident had "dissipated" when firefighter Blubaum exited Smith's apartment.[2] Based on the United States Supreme Court's decision in *Tyler*, 436 U.S. 499, however, we are constrained to disagree.

In *Tyler*, a local fire department responded to a furniture store fire in the middle of the night. Some evidence of arson was discovered during the course of fighting the fire, prompting an investigation by the fire chief and a police detective. By 4 a.m., the fire was extinguished and the firefighters had departed. At that time, the fire chief and the detective also ceased their investigation and left the premises due to poor visibility and the overpowering smoke and steam. At 8 a.m. the fire chief resumed his investigation, and at 9 a.m. the detective also examined and removed some evidence. Neither had a warrant nor consent to enter the premises. Additionally, on at least one occasion several weeks later, another police officer entered the premises to investigate without a warrant or consent. The defendants in that case--the furniture store owners accused of arson--objected to the admission of all evidence obtained during these entries, as well as any testimony by the attendant fire or police officials, on the grounds that the entries violated their Fourth Amendment rights.

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[2] The defense has not argued that firefighter Blubaum's initial entry was illegal or otherwise required a warrant.

The *Tyler* Court held that although as a general matter official entries to investigate the cause of a fire must adhere to the warrant procedures of the Fourth Amendment, a burning building presents an exigency of sufficient proportions to render a warrantless entry reasonable and, therefore, the Fourth Amendment is not violated by the entry of firemen to extinguish a fire. *Id.* at 508-09. The Court went on to hold that the exigency presented in a case of fire may continue past "the dousing of the last flame," such as where "[p]rompt determination of the fire's origin [is] necessary to prevent its recurrence" or where "[i]mmediate investigation [is] necessary to preserve evidence from intentional or accidental destruction." *Id.* at 509-10. As a result, the Court held that officials need no warrant to remain in a building for a reasonable time to investigate the cause of a blaze after it has been extinguished. *Id.* at 510. Accordingly, the *Tyler* Court ruled that the re-entries by the fire chief and police detective later that same morning after they had exited the premises at 4 a.m. "were no more than an actual continuation of the first" entries and therefore also did not require warrants or consent. *Id.* at 511. However, the Court determined that the entries occurring weeks after the fire were improper without a warrant because they were clearly detached from the initial exigency and warrantless entry.

Turning to the present case, we find Chief Watson and officer Cox's entry to investigate the fire in Smith's apartment analogous to those entries found to be constitutional in *Tyler*. Specifically, Chief Watson's entry to investigate the fire was no more than an actual continuation of firefighter Blubaum's initial entry. The record shows that Chief Watson and officer Cox entered Smith's apartment within minutes after Blubaum's exit. This is a substantially shorter time frame than that allowed between entries in *Tyler* and strongly suggests that the entries were part of a single fire investigation. Furthermore, the singular nature of this investigation is demonstrated by noting the sheer fortuity of firefighter Blubaum looking out the window to see Chief Watson and then exiting the apartment to meet him. Had Blubaum not peered out the window and simply awaited the fire chief's imminent arrival, there could be no legitimate claim that two separate investigations occurred. This demonstrates, to paraphrase the *Tyler* Court, that the only purpose to be served by requiring firefighter Blubaum to remain in Smith's apartment would have been to remove any doubt about the legality of Chief Watson's later entry. *Id.* at 511. We agree with other courts that constitutional distinctions should not turn on such occasions of happenstance. *See, e.g., United States v. $404,905.00 in U.S. Currency*, 182 F.3d 643, 649 (8th Cir. 1999) ("constitutional standard[s] . . . should not be governed by artificial

distinctions"); *accord State v. Box*, 73 P.3d 623, 629 (Ariz. Ct. App. 2003) ("the suppression of evidence should not turn on such artificial and fortuitous distinctions"). Accordingly, the entry by Chief Watson and officer Cox to investigate the cause and extent of the couch fire in Smith's apartment must be considered no more than an actual continuation of firefighter Blubaum's initial entry and, therefore, proper under the Fourth Amendment as interpreted in *Tyler*.

Our holding comports not only with the letter, but also the spirit of *Tyler*. That decision did not view firefighting as a task delineated by clear and unchanging boundaries, but rather acknowledged that the circumstances of particular fires and the role of firemen and investigating officials will vary widely. *See Tyler*, 436 U.S. at 510 n.6. The Supreme Court predicted that, in some circumstances, it may be necessary for officials--pursuing their duty both to extinguish the fire and to ascertain its origin--to remain on the scene for an extended period of time repeatedly entering or re-entering the building or buildings. Thus, *Tyler* admonished that appropriate recognition must be given to the exigencies that confront officials serving under these conditions, to the public safety, as well as to individuals' reasonable expectations of privacy. *Id*. Here, the exigencies confronting Chief Watson--a recently-doused couch in a driveway, a trail of soot leading to an apartment in an old building housing other tenants, and a request to investigate by the building's landlord--were of sufficient proportion to render his warrantless but timely re-entry "reasonable," regardless of whether a subordinate firefighter had made some preliminary determinations. These principles require that we reverse the decision of the district court finding no exigency for the second entry.

B. Consent to Subsequent Search

Smith contends his subsequent consent to search was coerced and therefore involuntary. The district court agreed, finding his consent coerced because the police threatened to seek a search warrant. The district court reasoned that such a threat rendered Smith's consent involuntary because it presented him with a "Hobson's choice."[3] That is, Smith's choice between consenting to a search or being searched pursuant to a warrant was no choice at all, for either way his apartment would be searched. The district court's "Hobson's choice" theory of

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[3] A "Hobson's choice" is defined as "an apparent freedom to take or reject something offered when in actual fact no such freedom exists; an apparent freedom of choice when there is no real alternative." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 1076 (1993).

coerced consent, however, is not supported by case law. *See, e.g.*, *State v. Davis*, 901 P.2d 1094, 1098 n.6 (Wash. Ct. App. 1995) (stating "though [an individual is] faced with a 'Hobson's choice,' bowing to events is not the same as being coerced, even if one does not like the choices."); *State v. Nelson*, 734 P.2d 516 (Wash. Ct. App. 1987). Since the voluntariness of Smith's consent was not impaired simply because he was faced with two unpleasant choices, and because the district court made no other material findings when it determined that Smith's consent was involuntary, we must remand this issue for further findings of fact and conclusions of law based upon the proper standard.

The U.S. Supreme Court set forth the standard by which the voluntariness of consent is measured in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). The Supreme Court held that consent must be "free from any aspect of official coercion," *id*. at 229, and further explained:

> [T]he Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion were applied, the resulting "consent" would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed.

Id. at 228. The *Schneckloth* Court also found the voluntariness of a consent to search to be a question of fact that must be determined from all the circumstances, *id*. at 221, and instructed: "[i]n examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents." *Id*. at 229. Finally, the Court placed the burden upon the state to show by a preponderance of the evidence that consent was voluntary. *Id*. at 248.

Idaho courts have utilized *Schneckloth's* standard in a number of cases. *See, e.g., State v. Varie*, 135 Idaho 848, 852, 26 P.3d 31, 35 (2001); *State v. Fleenor*, 133 Idaho 552, 554, 989 P.2d 784, 786 (Ct. App. 1999); *State v. Rusho*, 110 Idaho 556, 560, 716 P.2d 1328, 1332 (Ct. App. 1986). Of particular significance is *State v. Abeyta*, 131 Idaho 704, 963 P.2d 387 (Ct. App. 1998), wherein this Court addressed an issue similar to that presented in this case--the voluntariness of a consent to search in light of police threats to obtain a search warrant. After reciting *Schneckloth's* standard, we decided that a threat of securing a search warrant "does not necessarily render consent involuntary, [although] it is clearly a significant factor in determining whether consent to search was freely and voluntarily given." *Abeyta*, 131 Idaho at 708-09, 963 P.2d at 391-92. When viewed in light of all of the circumstances, we found it proper for officers

to inform an individual of their ability and intent to seek a search warrant so long as they "did not *falsely* or *erroneously* state that they had a legitimate right to search his residence." *Id.* at 709, 963 P.2d at 392 (emphasis in original). Accordingly, in *Abeyta*, we found an officer's threat to seek a search warrant proper because, under the totality of the circumstances, the officer's personal observation of stolen items in the defendant's possession provided sufficient probable cause to support a search warrant. *Id*.

In the present case, officer Cox's statement that a warrant would be secured if Smith refused consent was based on Cox's belief that he had sufficient probable cause to secure a warrant, i.e., his personal observation of the marijuana pipe and seeds when he was in Smith's apartment to investigate the fire with Chief Watson. As a result, officer Cox did not falsely or erroneously claim to have the ability to secure a warrant and, under *Abeyta*, this claim did not *ipso facto* render Smith's consent involuntary.[4] Our analysis does not end here, however, since the threat of obtaining a search warrant is only one factor in determining whether consent was voluntary. Rather, it must still be determined whether this, together with all of the other circumstances surrounding Smith's consent, amounted to the type of coercion prohibited by the U.S. Supreme Court in *Schneckloth*.

Smith claims that the officers' coercive actions in this case include: the police taking Smith from work to his apartment in the backseat of a police car; the officers' precluding Smith from walking away; one or more uniformed police officers accompanying Smith at all times; the police telling Smith they had already been inside his apartment and had already seen his contraband; the officers' suggestion that a warrant could be procured; the police telling Smith he would be detained, restrained from entering his apartment, and that the scene would be frozen until a warrant was obtained; the police telling Smith he needed to hurry to make his decision regarding consent, and that there would be lenient treatment if Smith consented; and the police implying that the judge would be angry if a warrant was sought on a Sunday. The district court, however, made no detailed findings of fact regarding Smith's consent nor related conclusions of

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[4] The state concedes that Smith's consent must be considered involuntary if the evidence supporting the probable cause to obtain a search warrant was obtained through an illegal search. *See Bumper v. North Carolina*, 391 U.S. 543 (1968) (finding false claims of authority to search to be no more than "colorably lawful coercion").

law under the standards set forth in *Schneckloth* and *Abeyta*. We are, therefore, unable to make a final determination as to the voluntariness of Smith's consent as a matter of law. Consequently, we must remand this issue back to the district court for further proceedings.[5]

III.
CONCLUSION

Because the investigation of a couch fire presented state officials with exigent circumstances, we reverse the district court's determination and hold the second warrantless entry into Smith's apartment to further investigate the fire was proper under the Fourth Amendment. Additionally, we vacate the district court's determination that Smith's consent to a subsequent search was involuntary, but remand to the district court for further findings and conclusions consistent with this opinion.

Judge LANSING and Judge GUTIERREZ **CONCUR.**

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[5] The district court, in its discretion, may utilize the existing record in making its requisite findings of fact. *See State of Zavala*, 134 Idaho 532, 536, 5 P.3d 993, 997 (Ct. App. 2000).